No. 87-732

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAMES E. WHEELER,
NORA WHEELER, and
SHARON K. MAY - - - - - Petitioners

versus

COMMISSIONER OF HIGHWAYS OF THE
COMMONWEALTH OF KENTUCKY - Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 1, 1987

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QUESTIONS PRESENTED

1. Whether the Kentucky Billboard Act (KRS §§177.830-177.890) and implementing regulations (603 K.A.R. 3:010) violate the First and Fourteenth Amendment freedom of expression of individuals who use billboards to communicate political and religious beliefs.

2. Whether the Kentucky Billboard Act and implementing regulations violate the Fourteenth Amendment right to equal protection of the laws of individuals who use billboards to communicate political and religious beliefs.

3. Whether the decision below conflicts with the decision of the United States Supreme Court in *Metromedia, Inc.* v. *City of San Diego,* 453 U. S. 490, 69 L.Ed. 2d 800, 101 S. Ct. 2882 (1981).

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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The Respondent, the Commissioner of Highways of the Commonwealth of Kentucky respectfully prays that the writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 22, 1987, be denied.

OPINIONS BELOW

On March 7, 1986 the United State Magistrate for the District Court rendered its decision in which the Court invalidated the Kentucky billboard statute and

regulations, concluding that they are violative of the Wheelers' right to freedom of expression under the First Amendment to the United States Constitution. A copy of the District Court's opinion appears in the Appendix A to the Petition for a Writ. (Hereafter: Pet. and page number). The opinion of the Court of Appeals also appears in that Appendix.

JURISDICTION

The Respondent, does not contest jurisdiction.

COUNTER STATEMENT OF THE CASE

Petitioners James E. Wheeler, Nora Wheeler and Sharon K. May are Kentucky residents who were denied permission in 1974 to erect a billboard on which they wished to communicate their political and religious ideas. (R. 186: *Nora Wheeler,* at T.R. 63-64; Sharon Kay May at T.R. 166-168). The site is located about 1000 feet south of the Jefferson County/Bullitt County line in Bullitt County, Kentucky one foot from the right of way fence of Interstate Highway Sixty-five (I-65). (R. 186, James E. Wheeler, T.R. 15) James and Nora Wheeler had been leasing the sign since 1964 for one dollar ($1.00) per year.

This action was brought by Petitioners in Federal District Court pursuant to 42 U.S.C. §1983 alleging denial of their rights to freedom of expression secured to them under the First and Fourteenth Amendments, United States Constitution and seeking a declaratory judgment under 28 U.S.C. §2201 that Kentucky Re-

vised Statute 177.841 and Kentucky Administrative Regulation 603 KAR 3:010* unconstitutionally deprive them of freedom of expression. The Wheelers further sought permanent injunctive relief prohibiting the Commissioner of Highways of the Commonwealth of Kentucky (hereafter Commissioner) from enforcing the challenged statute and regulation, as well as monetary damages arising from the violation of their constitutional rights.

The U.S. Magistrate granted summary judgment in favor of the Wheelers on October 25, 1982. (R. 120: Summary Judgment). He declared KRS 177.841 and 603 KAR 3:010* to be unconstitutional in violation of the Wheeler's First and Fourteenth Amendment Rights. The Commissioner appealed the judgment to the United States Court of Appeals for the Sixth Circuit, which remanded the action to determine the actual effect of the Kentucky billboard statutes and regulations on the Wheeler's First Amendment rights and whether the effect of said statutes and regulations is the same or similar to the regulations invalidated in *Metromedia, Inc.* v. *City of San Diego,* 453 U. S. 490 (1981).

On remand the U.S. Magistrate rendered his decision in which the Court invalidated the Kentucky billboard statute and regulations, concluding that they were void on their face in that they violate the First Amendment to the United States Constitution. He

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*Note: The U.S. Magistrate did not consider the validity of 603 KAR 3:020 which only applies to Federal Aid Primary Roads.

found that under the statute and regulations, signs advertising commercial activities would be allowed on the property but signs conveying many non-commercial messages (particularly those of religious, ideological, or political nature such as "Abortion is Murder," "Save the Whales" and "No Nukes") would not be permitted.

The Commissioner appealed to the Sixth Circuit. The Court reversed the judgment of the District Court. It ruled that the Billboard Act and regulations are content neutral, narrowly tailored to serve substantial state interests, and do not effectively deny the First and Fourteenth Amendment rights of the Wheelers. A copy of the decision of the Circuit Court is attached in the Appendix (Pet. 2a).

REASONS FOR NOT GRANTING THE WRIT

1. The Case Does Not Involve Important Unresolved Issues of the First and Fourteenth Amendment Rights of Freedom of Expression for Individuals Using Billboards for the Communication of Political and Religious Beliefs.

After a trial which was the culmination of twelve years of litigation, the United States Magistrate for the District Court for the Eastern District of Kentucky held that portions of Kentucky's statutes and administrative regulations are constitutionally defective "on their face" (Pet. App. p. 27a) and prohibit the utilization of the only media financially available to the Plaintiffs to communicate their views to large numbers of their fellow citizens. The District Court

Magistrate also found that the statutes and regulations in question "make distinctions based on the content of signs" and hence offended the Constitution of the United States,[1] even though the only criterion was that the message must advertise an on-site *activity*.

The Circuit Court held that the Kentucky Billboard Act, Ky. Rev. Stat. Ann. §§177.830-177.890 (Baldwin 1985)[2] and the Kentucky regulations implementing this statute, 603 Ky. Admin. Regs. 3:010 (1975)[3] are content neutral, narrowly tailored to serve substantial state interests and not unconstitutional.[4]

The facts set forth in the record clearly demonstrate that the statutes and regulations as applied regulate messages only insofar as necessary to determine if they relate to an on-premise *activity*. The statutes empower state authorities to distinguish between various communicative interests in the area of non-commercial speech and commercial speech only on the strictly neutral basis of whether it relates to an on-premise *activity*.

603 KAR 3:020 cited by Petitioners (Pet. p. 5) applies only to Federal Aid Primary (FAP) roads (Pet. p. 41a) and was never at issue in this case because the Wheeler billboard is on an interstate highway

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[1]See District Court Memorandum Opinion at Appendix B, Pet. p. 25a.

[2]The relevant Kentucky statutes are set forth in Appendix B, Pet. p. 60a.

[3]The relevant Kentucky administration regulations are set forth in Appendix C, Pet. p. 30a.

[4]See Appeals Court Decision at Appendix A, Pet. p. 2a.

and the controlling regulation is 603 KAR 3:010 (U.S. Dist. Ct., Pet. p. 25a)

Likewise, the Petitioners quote from the testimony of George Lovell (Pet. p. 5) only when he was discussing the aforesaid irrelevant regulation. Furthermore, how Lovell interprets the law is not at issue since the statutes and regulations speak for themselves and the U. S. Magistrate held they were unconstitutional on their face.

603 KAR 3:010, §2(3) defines "on-premise" advertising device as those devices that contain "a message *relating to* an *activity* or the sale of a product on the property on which they are located." Political, ideological, and religious messages such as "NO NUKES," "ABORTION IS MURDER," and "SAVE THE WHALES" are permitted if they can be related to on-premise activities, such as a meeting about those subjects.

The Petitioners quote two State employees (Pet. pp. 6 & 7) and then attempt to argue from this (bits of Lovell's testimony and the Petitioners' version of what an employee supposedly said) that "such conduct on the part of State officials violates the First and Fourteenth Amendment rights of the Wheelers to freedom of Expression." (Pet. p. 7).

The U.S. Magistrate made no such findings. Instead, he obviated the necessity of his making any findings by concluding:

". . . the Kentucky Billboard Act and regulations promulgated thereunder are unconstitutional on their face." (Pet. App. 27a).

Petitioners, also contend, the restrictions on non-commercial speech of the Kentucky statutes and regulations are *not* valid time, place, and manner restrictions because they regulate the *content* of the signs. (Pet. p. 7) However, the Petitioners do not cite any Kentucky statute or regulation that regulates *content,* because there is no such statute or regulation.

2. The Case Does Not Involve Important Unresolved Issues Concerning the Fourteenth Amendment Right to Equal Protection of the Laws for Individuals Holding Certain Political and Religious Beliefs.

In arguing the converse of the above, the Petitioners reiterate their previous argument that two State employees said the State was refusing to grant a permit due to the content of their proposed messages and personal antipathy. To which we repeat that the United States Magistrate made no such findings, presumably because he knew a detailed analysis of the record would not support them.

Then Petitioners added that the record showed they were too poor to use other media, but Mr. Wheeler testified that he has a net income of $514 every two weeks and owns his own house (R 186, James E. Wheeler, TR 26). Furthermore, the Wheelers do have another billboard on I-65 at Ormsby Street on a lot which he himself owns, zoned commercial before September 21, 1959, but rezoned residential (R 186 J. E. Wheeler, TR 33).

Mr. Wheeler bought the lot at I-65 and Ormsby Street for $1200. He estimated it cost $1000 for the

material. The sign painting and labor were donated (R 186 J. E. Wheeler, TR 37). He lets his friends put messages on this billboard, if he agrees with the messages. The first message was his own inspiration, "It had a . . . hammer and sickle on it, and it said, 'warning, we're approaching a Gestapo police state . . . . forced busing, rotten courts . . .' " (R 186, J. E. Wheeler, TR 38). Mr. Wheeler described his billboard at I-65 and Ormsby Street as having six poles, each forty feet long, with a face that is twelve feet by forty feet. He testified that it was a bigger sign than his Bullitt County sign and at a better location. Other messages he's allowed on it have been: ". . . keep the Ten Commandments, remove Steve Beshear . . ." (the Kentucky Attorney General who had given an opinion that it was illegal to post them in schools), an anti-abortion message, an anti-vehicle emissions test message, and ". . . shame on you, Martha Lane" (the Kentucky governor (R 186, J. E. Wheeler TR 42). Mr. Wheeler never has checked to see what it would cost to rent a big billboard 660 feet back from the right of way (R 186, J. E. Wheeler TR 44).

Mr. Wheeler has never even asked a TV station if he could have a message on their public service time and does not believe he ever will. He has had announcements on the radio, and he has had letters to the editors published. But as Mr. Wheeler testified: ". . . but the thing about it, I'm not really so much interested in public service messages, point of view letters, what I am interested in is a Constitutional ruling on whether this sign that we're litigating is within the Constitu-

tional limits, whether my sign with a free speech message is outlawed and a commercial message is (sic); I want to know those things and it's been twenty years that I've been trying. I'm not interested in radio, TV, renting billboards back 660 feet, those things are immaterial to me." (R 186, J. E. Wheeler TR 44-45).

So we see that lack of funds has not kept the Wheelers from using other media, or legal locations for a billboard. Lack of interest (and love of litigation) have kept the Wheelers—Mr. Wheeler in particular—trying the same case over and over for the last twenty years.

3. The Case Does Not Involve an Important Direct and Unresolved Conflict With the Decision of The United States Supreme Court in *Metromedia, Inc.* v. *City of San Diego*, 453 U. S. 490, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981).

The decision of the Circuit Court below does not conflict with the decision of the United States Supreme Court in *Metromedia, Inc.* v. *City of San Diego,* 453 U. S. 490, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981). In *Metromedia,* the City of San Diego adopted an ordinance governing outdoor advertising. The ordinance permitted onsite commercial advertising but prohibited other commercial advertising and non-commercial communications using fixed structure signs (i.e. billboards), unless permitted by one of 12 specified exceptions. The exceptions included government signs; religious symbols; temporary political campaign signs and others. (453 U. S. at 495-496) The Court described the effect of the ordinance:

> . . . (T)he occupant of property may advertise his own goods and services; he may not advertise the goods or services of others, nor may he display most non-commercial messages. (453 U. S. at 503).

The effect of the ordinance was to discriminate against non-commercial speech by limiting it to twelve specific exceptions. Speaking for the plurality in *Metromedia,* Justice White cited the case of *John Donnelly and Sons* v. *Campbell,* 639 F. 2d 6 (1980), aff'd. 453 U. S. 916 (1981), with approval and stated as follows (453 U. S. 513 at footnote 18):

> That court took a position very similar to the one we take today: It sustained the regulation insofar as it restricted commercial advertising, but held unconstitutional its more intrusive restrictions on non-commercial speech. The court stated: "The law thus impacts more heavily on ideological and non-commercial speech—a peculiar inversion of First Amendment values. The statute . . . provides greater restrictions—and fewer alternatives, the other side of the coin—for ideological than for commercial speech . . . In short, the statutes' impositions are both legally and practically the most burdensome on ideological speech where they should be the least.

The Kentucky statutes and regulations are not the same as the San Diego ordinance in *Metromedia.* The Kentucky laws only have one criterion that applies equally to commercial and non-commercial messages—they must relate to an on-premise *activity.*

The United States Court of Appeals for the Sixth Circuit correctly concluded (Decision filed June 22, 1987, No. 86-5423 at page 8, See Appendix, Pet. p. 10a):

> We believe that the Billboard Act and regulations are content neutral. They are not directed at the content of the messages but their secondary effects.

In arriving at the foregoing conclusion the U.S. Court of Appeals pointed out:

> The Supreme Court has recognized that the first amendment does not guarantee the right to communicate one's views at all times and places or in any manner. *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 425 U. S. 640 (1981). Expression, whether oral or written, is subject to reasonable time, place and manner restrictions. *Clark* v. *Community For Creative Non-Violence*, 468 U. S. 288, 293 (1984). Such restrictions are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a substantial governmental interest, and they leave open ample alternative channels for communication of the information. *Id. Accord Members of the City Council* v. *Taxpayers for Vincent*, 466 U. S. 789, 807 (1984); *Heffron*, 452 U. S. at 647-48 (Pet., 7a-8a).

The Circuit Court concluded that

> "the statute and regulations are valid place and manner restrictions." After discussing them in detail, the Circuit Court further concluded, ". . . the restrictions on the location of off-premises signs regulate the secondary effects, not the content of these signs." (Pet. 8a)

The Supreme Court has recently considered the validity of a restriction designed to regulate the secondary effects of protected speech. In *City of Renton* v. *Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986), the Court considered a challenge to a zoning ordinance that prohibited adult theaters from locating within 1000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The Court noted that the ordinance treated theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, the Court noted that the ordinance was not aimed at the content of the films shown, but rather at the secondary effects of such theaters on the nearby community. *Id.* at 929. Accordingly, the Court found that the ordinance was consistent with its definition of "content-neutral" speech because it was justified without reference to the content of the speech, and stated:

> The ordinance does not contravene the fundamental principal that underlies our concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."

Id. at 929 (quoting *Police Dep't of Chicago* v. *Mosley*, 408 U. S. 92, 95-96 (1972)).[6]

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[6]The *City of Renton* Court relied on *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976), where the Court concluded that zoning ordinances designed to combat undesirable secondary effects of adult theatres are to be reviewed under the standards relating to

(Footnote Continued on Next Page)

In *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981), the Court considered a rule promulgated by a public corporation that required all persons desiring to sell, exhibit, or distribute materials during the state fair to do so only from fixed locations. The Court concluded that the restriction was content neutral and a reasonable restriction on place and manner because it applied evenhandedly to all . . ." (Pet. 8a-9a).

The Circuit Court went on to observe,

> Furthermore, the on-premises/off-premises distinction does not constitute an impermissible regulation of content just because the determination of whether a sign is permitted at a given location is a function of the sign's message. Kentucky, by allowing persons who own or lease property, to have a sign, subject to size and space restrictions, advertising an activity conducted on the property is not favoring one message over another. The state has simply recognized that the right to advertise an activity conducted on-site is inherent in the ownership or lease of the property. In *Linmark Assocs., Inc.* v. *Township of Willingboro*, 431 U. S. 85 (1977), the Court considered an ordinance that prohibited the posting of "For Sale" signs or "Sold" signs because the township sought to abate the flight of white homeowners from a ra-

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(Footnote Continued From Preceding Page)

content neutral time, place, and manner regulations. The Court held that the City of Detroit could distinguish between adult theatres and other kinds of theatres because it was not regulating the dissemination of "offensive" speech. *Id.* at 71.

cially integrated community. The ordinance did not prohibit other types of signs. The Court found the ordinance unconstitutional because the township enacted the ordinance to prevent its residents from obtaining certain information. *Id.* at 96.

In view of all the foregoing it is obvious that there is no conflict between the decision of the Circuit Court in this action and that of the United States Supreme Court in *Metromedia, supra.*

CONCLUSION

A writ of certiorari should not be issued to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December, 1987, three copies of the Brief in Opposition to Petition for Writ of Certiorari each were mailed postage prepaid to Theodore H. Amshoff, Jr., and Richard L. Masters of Amshoff, Amshoff & Searcy, 1012 S. Fourth Street, P. O. Box 2848, Louisville, Kentucky 40201 and Lewis G. Benham, 310 W. Liberty Street, Louisville, Kentucky 40202, Counsel for Petitioners; Richard K. Willard, Assistant Attorney General, Louis G. De Falaise, United States Attorney, John F. Cordes, John F. Daly, Attorneys, Appellate Staff Civil Division, Room 3631, Department of Justice, Washington D.C. 20530; and Bert T. Combs, Sheryl G. Snyder, William H. Hollander, Wyatt, Tarrant, and Combs, Counsel for Outdoor Advertising Association of Kentucky, Incorporated, Citizens Plaza, Louisville, Kentucky 40202. I further

certify that all parties required to be served have been served.

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